

**MEMORANDUM**

**TO:** Board of County Commissioners

**FROM:** Anthony Raguine, Principal Planner

**DATE:** March 2, 2022

**RE:** Appeal of Hearings Officer's approval of an application to establish a 155-foot-tall monopole in the Exclusive Farm Use Zone; Land use file nos. 247-21-000889-AD and 247-22-000168-A

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On March 7, 2022, the Board of County Commissioners ("Board") will consider hearing an appeal of the Hearings Officer's approval to allow AT&T to establish a wireless telecommunications facility ("facility") in land use file number 247-21-000889-AD.

**I. PROPOSAL**

The proposed facility will include a 150-foot-tall monopole topped with a 5-foot-tall lightning rod; associated antennas; a 50-foot by 50-foot lease area surrounded by a 6-foot-tall chain link fence; and an equipment cabinet and a backup generator within the lease area. The facility will be located within the Highway 20 right-of-way ("ROW") administered by the Oregon Department of Transportation ("ODOT").

**II. PROCEDURAL HISTORY**

A public hearing before the Hearings Officer was conducted on November 9, 2021. The Hearings Officer issued his approval of the facility on February 15, 2022. A timely appeal was filed by Gary Sherman on February 28, 2022. The appeal file number is 247-22-000168-A.

**III. SHERMAN APPEAL**

Gary Sherman, the appellant, requests the Board review the Hearings Officer's decision on appeal to address the following summarized issues.

- Mr. Sherman argues the LM Zone applies to all structures, regardless of whether a building permit is required. For this reason, the 30-foot height limit of the LM Zone applies.

- The Hearings Officer's decision ignores the underlying purpose of Goal 5 and the protection of scenic views.
- The Hearings Officer's decision will set a precedent, exempting all structures built within public ROW from LM review.
- The Hearings Officer incorrectly categorized the proposal as a road or highway project, rather than as a utility facility.

Mr. Sherman does not specify a preference for the form of any appeal hearing – on the record, limited *de novo*, or full *de novo*.

#### **IV. BOARD OPTIONS**

There are two versions of Order No. 2022-016 attached to this memo; one to hear the appeal and one to decline to hear the appeal. In determining whether to hear an appeal, the Board may consider only:

1. The record developed before the Hearings Officer;
2. The notice of appeal; and
3. Recommendation of staff<sup>1</sup>

In addition, if the Board decides to hear the appeal, it may consider providing time limits for public testimony.

If the Board decides the Hearings Officer's decision shall be the final decision of the county, then the Board shall not hear the appeal and the party appealing may continue the appeal as provided by law. The decision on the land use application and associated appeals becomes final upon the mailing of the Board's decision to decline review.

#### **V. 150-DAY LAND USE CLOCK**

The 150<sup>th</sup> day on which the County must take final action on these applications is May 30, 2022.

#### **VI. FEDERAL "SHOT CLOCK"**

The proposed Facility is subject to Title 47 of the Code of Federal Regulations ("CFR") and, specifically, Section 1.6003(c)(1)(iv) of those regulations. The federal rules establish the presumptive amount of time deemed necessary to review a wireless telecommunications facility as being no more than 150 days. The County has an obligation to act within a reasonable time, and anything longer than that time period is presumed to be unreasonable. This federal "shot clock" begins from the date the application is submitted. Based on the application date, the federal shot clock requires the County to take final action on the application by February 28, 2022.

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<sup>1</sup> Deschutes County Code 22.32.035(D)

Notwithstanding that deadline, 47 CFR 1.6003(d), in addition to automatically extending the time period for certain purposes, allows the applicant and the County to mutually establish a tolling period that extends the time the County has to make a final decision. During the public hearing process, the applicant requested and agreed to adding 63 days to the County's proceedings. Further, during the Hearing, the applicant's representative confirmed that the record extension was acceptable for purposes of the federal shot clock. Based on the applicant's agreement to extend this proceeding, the federal shot clock is extended to at least May 2, 2022.

## **VII. STAFF RECOMMENDATION**

Both the local and, particularly, the federal shot clocks can become an issue as detailed above. The appellant was able to present all relevant evidence at the hearing and during the open record period. The Hearings Officer's analysis and decision can be supported by the record. The Board will not likely be given deference regarding the proper categorization of the use because the relevant use categories originate from statute, not the Deschutes County Code. For these reasons, staff recommends the Board not hear this appeal.

## **VIII. RECORD**

The record for land use file nos. 247-21-000889-AD is as presented at the following website:

[https://aca-oregon.accela.com/oregon/Cap/CapDetail.aspx?Module=Planning&TabName=Planning&capID1=21CAP&capID2=00000&capID3=008TI&agencyCode=DESCHUTES\\_CO&IsToShowInspection=](https://aca-oregon.accela.com/oregon/Cap/CapDetail.aspx?Module=Planning&TabName=Planning&capID1=21CAP&capID2=00000&capID3=008TI&agencyCode=DESCHUTES_CO&IsToShowInspection=)

The record materials can be accessed by clicking on the Record Info/Schedule Inspections tab and selecting Attachments.

Attachments:

1. Sherman Appeal
2. Location Map
3. DRAFT Board Order 2021-016 Accepting Review of the Hearings Officer's Decision
4. DRAFT Board Order 2021-016 Declining Review of the Hearings Officer's Decision